No. 22465

United States Court of Appeals
For the Ninth Circuit

HOWARD R. KIENLE and DORA J. KIENLE, his wife,
Appellants,

vs.

ALAN BOUD FLACK, an underwriter at Lloyds, London, on behalf of himself and all other Underwriters at Lloyds, London, Subscribing Certificate of Insurance No. 18201 issued by VOIGHT, WALKER & CO., INC.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANTS' REPLY BRIEF

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A. Observations Concerning Appellee's Counter Statement of the Case.

Appellee's counter statement of the case emphasizes the collateral indemnity agreement reached between the insured escrow, Pacific Farwest, and the purchaser of the real property, Northwestern, which the former required before it would release the seller's deed. Indeed, the emphasis on this circumstance produces an expectation in the reader's mind that some substantive legal significance will later be claimed to therefrom flow, but we are no more edified than we were by appellee's answer to appellant's pre-trial interrogatory concerning the same matter (Interrog.

10, R 43). When one reflects that the "phony" corporation with whom the escrow was dealing was a purchaser who could show a net-worth Dun & Bradstreet report of almost a million dollars (p. 5, lines 19-21 of Exhibit 4), must not one reasonably conclude that the escrow probably thought it was carefully immunizing from liability both itself and its insurer if it later should be held to have been in error? Does this not argue strongly *against,* rather than support, any suggestion of indifference toward exposing the insurer to risk? No law is cited in that brief, and we are sure none can be found, which makes this act of precaution *substantively* relevant in any way. Concededly, it is probative of the fact that the deed was released deliberately, after a business decision to release it, but, throughout this litigation, that fact has been admitted.

On page 6, appellee states that Mr. McCormick wrote to Mr. Moss "advising him that the allegation against Pacific Farwest of collusion with Northwestern had been withdrawn and that an amended complaint had been filed." This letter, Ex. 5, also plainly stated that "all parties have been served." Might this omission have been prompted by awareness of this court's approval of *actual notice* of service as a substitute for delivery of suit papers? *Indemnity Ins. Company of North America vs. Forrest,* 44 F2d 465 (CA 9, 1930).

On page 7 it is stated, in reference to the *post-trial* telephone conversation of November 3, 1965, that "(T)his was insurer's counsel's first notice of the existence of an indemnity agreement." This, despite the testimony of insurer's counsel that ten months earlier, on January 6, 1965, Mr. Yates had told him that Yate's client, Pacific Farwest " . . . had received, $1,500.00 in cash as an indemnity fund from the buyer,

Northwestern Utilities, to cover costs and attorney's fees, and that fund was garnished by the plaintiffs subject to Mr. Yate's rights as counsel" (Tr. 58, lines 20-24). This collateral arrangement also was referred to in Mr. Moss's February 15, 1965 letter declining coverage (Ex. A-22, Tr. 60).

Further, appellee's counter statement quite superfluously emphasizes the belated and unproductive *post-trial* letter writing activities of its counsel. Referring to page 7 of appellee's brief we respectfully ask this Court to carefully ponder such a statement as:

> "Mr. Moss advised Yates that underwriters *might* want to finance an appeal if, after review by appellee's counsel of the documents and evidence, it was counsel's recommendation that an appeal was indicated." (Emphasis ours.)

Viewing this in its actual time setting, does not the slightest emphatic reflection illumine how facetious, if not audacious, such a suggestion would have appeared to Mr. Yates, the insured's counsel? Here was the insurer's counsel, who had unequivocably made clear his client's position that mistaken business decisions were not within coverage, asking an attorney (whose client was "broke") to pay a court reporter $1,000.00 for the transcript of seven trial days of testimony (Tr. 73) so that the former might decide *whether to recommend* that the insurer pay for it!

B. Reply to Appellee's Argument.

Appellants admit that they made no effort to retry the original state court action (Br. 11), i.e., the previously decided issue of the insured escrow's liability to the appellants. Throughout, our contention has been that the insurer is bound by the state court judgment and that judgment's essential supportive

findings.[1] If that judgment is held to be properly open to attack, it still remains *prima facie* correct, so that it is appellee's burden to prove that it should not be binding. *Costello v. Bridges,* 81 Wash. 192, 142 Pac. 687; *National Surety v. Fry,* 86 Wash. 118, 149 Pac. 637; *Kibler v. Maryland Casualty Co.,* 74 Wash. 159, 132 Pac. 878. This it did not do — nor was it so expected. It was well understood by the original district court judge[2] that it might never be necessary to re-try this previously litigated issue. It was for this reason that the court entered its order of May 24, 1967, setting the trial on July 5 to be on all issues "*except* liability of Escrow Co. to the plaintiffs" (Emphasis ours) (R. 292). This order was never vacated.

Appellants heartily agree with the basic rule quoted, on page 12 of appellee's brief, from *East v. Fields,* 42 Wn. 2d 924, 259 P2d 639. Our differences emanate, not from what the law *says* but from what the law *means.* Appellee, as did the trial judge, seems to insist that compliance consists of nothing less than the *precise formalities* which fit the *language* of such rules. Appellants insist that the law requires only such compliance in *substance* as fits the *purpose* underlying the decisional promulgation of such rules. For example, by ignoring our citations of authority approving the receipt of notice from other sources than the insured, we presume appellee continues to champion a literal interpretation of the requirement that "the *insured* must give notice."

Appellee stresses the importance of distinguishing between the original complaint and the amended complaint in determining whether it had adequate notice

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[1] 2 Freeman, Judgments, Sec. 693, 708.

[2] The Honorable William J. Lindberg.

of the proceedings and had an opportunity to defend. Assuming, arguendo, that the original complaint did in fact allege dishonesty so as to come within the policy's exclusionary clause, 6 b, still, when the insurer was admittedly notified that the allegation of collusion had been withdrawn, should not the insurer plainly have known that the plaintiffs were now seeking damages based upon the innocent, albeit legally wrongful, release of their deed? Moreover, knowing the probative difficulties inherent in fraud actions and the exacting quantum of proof required, should not there be an ever-present awareness on the part of insurer's counsel that a case alleging fraud, even without pre-trial amendment, may, and often does, result in a judgment predicated upon no more than an innocent breach of duty? Is this not quite different from the much more tangible facts which often fit exclusionary clauses, such as being an employee, driving a vehicle without permission, or assaulting someone? Even where the *duty* to defend existed, it has recently been held, in respect to a professional "errors and omissions" policy, that the insurer may not rely upon general allegations of conspiracy in declining the defense. *St. Paul and Marine Ins. Co. v. Icard,* 196 So. 2d 219 (Fla. 1967).[3]

Important to notice is that, here, we are not even specifically concerned with the criteria for determining whether or not there arose a *duty* to defend. By its own policy appellee absolved itself of any duty to defend in any case. No *demand* for participation could rightfully be made by the insured. But the same policy, figuratively speaking, tendered to its author the opportunity to *take over* the defense of any claim *if it so desired.* Clearly, Pacific Farwest's notice to

[3]This is the same jurisdiction whose law was being applied in *Sussman.*

appellee insurer of the pendency of the action was at least a clear invitation for its assistance.[4] If it chose not to take over, or even to assist, as it had a perfect right to do, after it was put upon notice that the pleadings no longer alleged collusion against its insured, it should now abide the gamble. As is stated in the same Section 107 of the Restatement of Judgments as is cited by appellee (Br. 18),

> "If he fails to give this assistance at the time when it is of greatest importance, it is fair that he should abide by the result of the trial."

On page 12 of its brief appellee rather deftly edits what it quotes from the Restatement of Judgments. This court will note that the section concerns itself largely with the general principles of common law indemnity flowing from such relationships as master-servant, principal and agent, etc. On page 515, we note instances of relationships where "a request to defend and a tender of control can normally be inferred upon a seasonable notification of the pendency of the action, since such notification would obviously be only for the purpose of inviting in the indemnitor." This concept is as old as Wall. See *Robbins v. Chicago,* 4 Wall (U.S.) 657, 18 L Ed 427.

Particularly, we feel that the insurer's failure to participate in the state court action should be viewed with the indemnifying clause of the policy in mind. In order for the duty to indemnify to arise it would seem unnecessary that the insured's liability arose because a negligent act or an error *"was committed" in fact,* but it is sufficient if such act or error *"may have*

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[4]Presumably this is admitted. "Defendant was given notice and the opportunity to defend the original complaint" (Def. Tr. Br. p. 2, lines 11-12, R 88). The very fact the insurer declined makes clear that notice was regarded as an invitation.

been committed, on the part of the Assured . . . about the conduct of any business . . . in their professional capacity as Escrow Agents" (Ex 1, Tr. 18, Proviso and Condition 2).

Appellee's view, accepted by the trial judge, that the amended complaint became a completely *de novo* claim and that, upon its filing, the original complaint for all purposes instanto vanished — that the filing, serving and forwarding to the insurer of the original complaint must now be entirely ignored — is simply not realistic. Can justice rooted in reality condone any such artificiality? Truth implores this court to once more free it from the fetters of form. The "new proceeding" concept was thought to be an unbemoaned casualty of the federal procedural revolution. Certainly an original complaint has sufficient existence that amendments may relate back to it even after a statute of limitation has run against it. FRCP Rule 15 (c).

See Moore, Federal Practice, Second Ed. p. 1045-46 as to origin of the "new proceeding" concept respecting amended complaints.

The very dearth of authority which requires appellee to rely upon such cases as *General Insurance Corporation v. Harris,* 327 SW 2d 651, and *State Mutual, Etc. Insurance Co. v. Watkins,*[5] 180 So. 78, is in itself revealing. On the somewhat remarkable facts of these cases, it might be said that both claimants received undeservedly respectful treatment by the appellate courts.

On page 17 of its brief appellee notes that Mr. Mc-

[5]We do note from Watkins that there was used the device of getting information from the court files.

Cormick sent his letter advising of the amended complaint to Mr. Moss, who had closed his file, and not to the underwriters. To counter any purposeful intimation that Mr. Moss was not the insurer's counsel at this time, we respectfully call attention to the insurer's answers to interrogatories, particularly numbers 2 and 6 (R. 40-4). By its answer to number 6, of course, the *insurer admitted* receiving notice that the amended complaint had been filed. Exhibit 5 shows conclusively that the same notice *advised of the service of process.* In *Metropolitan Cas. Ins. Co. v. Colhurst,* 36 F2d 559 (9th Cir. 1930) which appellee, quite curiously and remarkably, states "is in complete accord with appellee's position" (Br. p. 29), this court stated at page 561,

> "The important consideration was that appellant *should be advised of the service of process* so that it should appear in response thereto, in the assured's name, and make defense." (Emphasis ours.)

A few months after this court decided *Colhurst,* its decision in *Indemnity Insurance Co. vs. Forrest,* 44 F2d 465 (9th Cir. 1930) showed quite conclusively that almost forty years ago this court would not be enslaved by form over substance in such matters and certainly no capitulation has since been noticed.

Moreover, we submit that, here, the circumstances surrounding the insurer's declination of coverage were certainly as inducive of a belief in the futility of forwarding the amended complaint as were the circumstances inducive of a belief in the futility of filing an amended proof of disability in *Pagni v. N. Y. Life Insurance Company,* 173 Wash. 322, at 334, 23 P2d at

p. 10.[6] Too, in the cited case, filing of proofs appears to have been a condition precedent. Here, forwarding of suit papers was not.

Repeatedly, throughout appellee's brief it claims that it was *prevented* from defending. Was it really? It is to be remembered well that, prior to trial of the state court action, appellee requested *once and once only,* a copy of the amended complaint — and this request was made of an insured's counsel who it must have expected would consider it idle to respond, in view of having been at least twice told[7] that damages resulting from deliberate business decisions would not be covered. Even so, we dare say the letter of request was still written with breath held and fingers crossed. *This single letter carefully avoided mention of any policy condition.* And counsel must have well known that just a copy to Mr. McCormick would have prompted a flurry of activity.[8]

When one considers counsel's answer to the trial judge, "Well, your honor, the answer is I had no knowledge of the Amended Complaint until after the trial" (Tr. 55, lines 5-7), at the same time contem-

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[6]"Where the denial of liability on the part of an insurance company is of such a character, or made under such circumstances, as reasonably to induce a belief that the submission of further proofs will be useless, a waiver of defects in, or insufficiency of, the proofs furnished and a waiver of the requirement to furnish additional proof will be effected. The insured is not concluded by the proofs submitted, and may, within the period of limitation, prosecute an action for collection of disability benefits. The waiver would not be affected by the submission of further proofs of disability after denial by insurer, under facts such as obtain in the case at bar, of liability after receiving first proofs of disability" (p. 334).

[7](Tr. 59, lines 1-7 and Ex. A-22, Tr. 60).

[8]The fact that the insured's judgment creditor was willing to aid the insurer with its investigation has most recently been noted by the Supreme Court or Arizona as one of the circumstances which caused that court to excuse a delay of two years in giving notice to one insurer and of 17 months to another. *Lindus v. Northern Insurance Co. of New York,* 438 P2d 311 (Ariz. 1968).

plating the number of times counsel must have been in the King County Court House during those five months of quiescence, one must admire the self-discipline that resisted even a peek. Or, would curiosity be wholly lacking because any attorney who had looked at the "release of the deed" facts alleged in the original complaint would know how they would look with an allegation of collusion withdrawn?

Despite appellee's ingenious attempt to create a condition precedent suit-forwarding clause (Br. 23), the fact remains that nowhere in this policy may one be found. This being so, and even radically assuming that failure to place the amended complaint right side up into the hands of insurer's counsel prevented it from defending, *where is the prejudice?* The insurer's interests in the state court action were *derivative* only, and they were vigorously and skilfully represented. Even if the insurer had sought to intervene it might properly have been denied the right to so do upon the state of this record. WCR 24, FRCP 24, *Farmland Irrigation Company v. Dopplmaier,* 220 F2d 247 (CA 9, 1955).

Again, repeatedly, appellee persists in its claim that failure to *deliver to it requested documents* was a violation of a condition precedent requiring the insured to *"give information."* Abandoning, only momentarily, our position that the first paragraph of Provisos and Conditions 5 is susceptible of a disjoinder of clauses which saves the "give information" clause from being a condition precedent, and, conceding arguendo, that despite the scrivener's use of the singular, both clauses state conditions precedent, are we not still compelled to narrowly and strictly construe the words, "give information"? Hindsight-

edly, the comfort which would have attended use of such additional words as "furnish documents" is obvious. But such simple words were not used and such attendant comfort to the insurer is lacking by their absence. "Give information" means no more than "to inform." "Inform" means "to communicate knowledge to; to make acquainted; to acquaint; advise; instruct; tell; notify; enlighten." Webster's International Dictionary, Second Edition, Volume 1.

Sec. IV C of Appellee's brief (pp. 33-51), concerns the question of whether the wrongful release of the deed comes within the language "negligent acts, errors or omissions." This section of argument is prefaced by the observation that this "... is doubtlessly the most intellectually challenging issue in this case." Could this be a concession? Might it be that the mental tease is produced because the clause is susceptible to two constructions? Rarely ever is the obvious "intellectually challenging."

Admittedly, the insured was an escrow agent. In the course of its business as such it was found to have wrongfully released from its custody the deed to the appellant's property. It intended no harm;[9] it believed it had a legal right to so do. It had available to it the right to interplead the parties and was so advised by its counsel. It omitted doing this. It released the deed after twice being warned not to release it. In one breath appellee feigns difficulty in finding that such an escrow agent was negligent. It has insisted throughout that the escrow acted within its legal rights. In the next breath, it seems to argue for wilful misconduct. We agree that if such misconduct mea-

[9]No contention has ever been made that the harm to the Kienles was ever intended.

sures up to the standard of the reasonably prudent professional escrow agent then negligence has not been shown. But, does it not fall below that standard as a matter of law?

Although, through the print we detect a wink, appellee, twice in its brief, seeks to cast aspersions on the state court's findings because they were drafted by appellants' present counsel (Br. page 8 and page 37, footnote (7)).

We are criticized for having included words not used by Judge Shorett in his oral opinion. We respectfully submit that those findings, which were closely examined by the court and by four opposing counsel, follow the court's oral opinion ever so much more closely than appellee's proposed and accepted findings followed the district court's oral opinion in the instant case.[10] The law in both forums is essentially the same. (*Feree v. Doric Co.*, 62 Wn. 2d 561, 383 P2d 900).

Suppose a general medical doctor, contrary to the instructions of his patient, performed radical surgery, after first having consulted specialists who recommended non-surgical conservative treatment, the doctor honestly believing he was doing the right thing, and the patient died. How successful would be his professional errors and omissions carrier in asserting a defense of non-coverage because this was a deliberate, intentional act as a result of a professional decision and in direct violation of his patient's instructions?

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[10]Although appellee had no right to go behind the state court findings (because, whether binding or not, they are the findings of the court and control over an oral opinion) still we cannot resist reference to the state court's particular notice in its opinion from the bench of what, as a professional escrow agent, Pacific Farwest, should have known. The court stated, in addition to finding a breach of contract, "I think the escrow here violated his plain duty." Certainly much of his oral opinion sounded in tort.

Lest it be argued that employment of the language "*malpractice,* errors and omissions" is a basis for distinction, it must be remembered that malpractice is simply the failure to fulfill the duty which the law implies from the contract of employment, to exercise a certain standard of care, skill and diligence. *Richardson v. Doe,* 199 N.E. 2d 878 (Ohio, 1964). Essentially the same test applies throughout the professions. Upon the above hypothetical facts, can anyone seriously doubt what the Washington Supreme Court would hold if such insuring clause, instead, used the words, "negligent acts, errors or omissions"? (*Sutherland v. Fidelity & Casualty Co.,* 103 Wash. 583, 175 Pac. 187).

It is likely that the understandable tendency to apply old imbedded concepts of insurance law to a case involving a relatively new area has been largely responsible for the trial court's errors.[11] Appellee complains that to hold it bound by the state court judgment would make it a "partner" with its insureds in the conduct of their businesses — that its liability, in effect, would be dependent upon its insureds' exercise of their individual judgments in the conduct of their specialties. Quite true, if that exercise of judgment falls below the acceptable standard governing a particular profession, and harm thereby results. This no doubt accounts for the rather substantial premiums charged for such coverage — as well as accounts for the type of questions asked upon application.[12]

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[11]See article "Professional Liability of Architects and Engineers" in 1964 Insurance Law Journal 461 and article in 1966 volume, p. 746.

[12]For example, the application here, which was made part of the policy, asked the prospective insured whether or not there was an attorney connected with the firm, its experience as an escrow, whether any prior claims had been made against it, etc. (Ex. 1, Tr. 18).

Appellee's persistent argument that "intentional and wilful" acts are not covered is based upon thin-shelled semantics. Certainly, when the trial judge employed these words in his findings of fact, he could not have intended to use "wilful" in the sense that the actor intended that Mr. and Mrs. Kienle would lose their property without compensation. This has never been asserted and the record is devoid of any evidence to support such a finding if that meaning is sought to be attributed to it. And we do not so read appellee's brief.

Despite the language quoted from *Adkisson v. Seattle* (Br. 40), a negligent act is ordinarily intentional in the sense that it is a product of the actor's volition. The conscious driver who negligently uses an exit to enter upon a freeway fully intends to steer as he is steering; take away his volition — e.g. a heart attack has caused his vehicle to wander onto the exit, or someone had a gun in his ribs — then, negligence disappears.

In *Ferrell v. Cronath,* 67 Wn 2d 642, 409 P 2d 472, the escrow *intended* to file the conditional sales contract in the county where he did file it. He was negligent in not having filed it in the proper county.

In *Kirby v. Woolbert,* 48 Wn 2d 141, 291 P 2d 666, the escrow deliberately turned over money to the executrix contrary to instructions. The decision states, p. 143: "The excess was paid by the escrow company by mistake and upon the representation of the executrix' attorneys that the amount was due her." The court characterized this as a "breach of its undertaking."[13]

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[13]Here, Northwestern's attorney convinced the insured that Northwestern was legally entitled to the deed.

In *Gray v. England,* 69 Wn 2d 52, 417 P 2d 357, Lawyers' Title Insurance Company acted intentionally, doubtlessly after having first decided it had a right to extinguish the escrow fund. "When Lawyers extinguished the fund without giving reasonable notice to Gray and/or impleading the $2,300.00, it did so at its peril. . . ."

In *St. Tammany Bank and Trust Co. v. Winfield,* 254 Fed. 785 (5th Cir. 1918), when the bank delivered the bills of sale to Mr. Wertz it did so intentionally.

In all such cases[14] it is negligence for the escrow to breach his duty.

In any such case, is anything to be accomplished, and should the law require, particular labels? Whether we say that an escrow has breached his contract of employment, or has violated his trust, or has failed in his duty, or has been unfaithful to his undertaking (things that reasonably prudent escrow agents do not do) — in any such case, does it not necessarily mean that his conduct in the premises has been negligent — that it has fallen below the required standard of exercising the skill and care, or possessing the knowledge and judgment that would be exercised or possessed by

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[14]Appellee seems to suggest that in all such cases, inadvertance or error or omissions occurred somewhere in the escrow's course of conduct. The state court findings (Ex. 4, Tr. 20) show the following:

Mistaken reliance on Northwestern's assurances.

Failure to discover that these contracts were in violation of the platting laws.

Failure to examine the contracts being used as "payment."

Mistakenly delivering the deed believing the plat had been approved when it was not approved until later.

Failure of an experienced escrow to be alerted by the peculiarity of the "payment" clauses.

Failure to determine that the County Engineer had not yet received the required improvement bond.

the reasonably prudent escrow agent? See *Spoziani v. Millar,* 30 Cal. Rptr. 658, 666-667. Those who would make of the law a game of pinning labels are usually fearful of examining the substance underneath.

On page 37, appellee states: "In contrast, in the state court action by Kienle, the only *facts essential to the judgment* against Pacific Farwest was that it delivered the deed in violation of the seller's instructions." Must not such an act be held, as a matter of law, to fall below the required standard?

We submit that too often in its brief appellee drops a small square peg into a big round hole and exclaims "See, it fits!" For example, the language quoted from *Adkisson v. Seattle,* 42 Wn 2d 676, 258 P2d 461, pertains exclusively to bodily injury or death. It concerns acts which are committed or omitted in *reckless disregard of human bodily safety.* (See Restatement of Torts, Sec. 500). By holding that the unlighted pile of dirt, under the circumstances, posed a jury question, the court avoided, in the interest of *plaintiffs' recovery,* the bar of contributory negligence. The 1904 *Nome Beach* case (Br. 42) involved damage to a cargo under an "all risks" policy governed by a California statutory "exclusion" clause, expressly excluding wilful acts. The instant policy contains no such clause. *Town of Tieton* cited on page 40 involved an "accident" policy — which appellee at times seems to subtly suggest the instant policy is — but which it clearly is not. The most impressive thing about the cited English cases is the fact that appellee found it necessary to travel such a distance.

We submit that, the resort to Dr. Curme's work on grammar, defeats rather than supports appellee's con-

tention when the quoted passage is properly read and applied. Appellee simply applies the rule in a manner which first assumes the words mean the same thing when abundant legal authority says otherwise. The presumptively, carefully written policy language, here, no more constitutes an "oratorical triad" than somewhat similar words did in *Burns v. American Casualty Co.,* 273 P2d 605 (Cal. 1954).

Appellee makes the concession on page 49 that "this court need not hold that every intentional act is beyond policy coverage". This "little bit pregnant" type of argument leaves much to be desired. Certainly, the single case cited does not define the boundaries of what the underwriters have in mind. Perhaps, they prefer to make a decision as to which cases fit their thinking after the fact of each loss. It strikes us that this is too much like "I'm thinking of a number from 1 to 10; if you guess it, you win."

Quite mindful of the usual and understandable displeasure of courts with overstatement, we earnestly and most thoughtfully submit that appellee insurer's defense in this case consists of little more than a wondrously woven web of words.

In most instances appellate decisions have been artfully dissected and certain language cleanly extracted with little regard to their underlying facts.

Such cases as *Van Riper v. Const. Gov't League,* 1 Wn.2d 635, 96 P.2d 588, show how far the Washington court will go to find coverage, even where there is a specific exclusion of *criminal* violations of law. The court refused to be bound by the legal definition of "criminal." There can be little doubt but that the state court would have construed "negligent

act'' as broadly as a layman might.

Before concluding, it may be well to remind the court that any acts of appellee of which complaint may have been made herein or any criticism of motives are in no sense directed at its counsel. The insurer simply determined that the better gamble was to forego a defense on the merits and, instead, to pursue the course that has been pursued. As is often the case, the insurer has been represented by most capable counsel whose personal integrity is a matter of common knowledge.

In conclusion, appellants urge that all of the *material* issues in this case are issues of law. They have been so regarded by both sides throughout. The statements made by appellants, appearing at the top of p. 3 of their opening brief have been accepted without quarrel by appellee. This court is certainly in as good a position as the trial judge to pass upon these legal issues. We respectfully submit that preservation of sound law requires a reversal herein with directions to the court below to enter judgment in favor of Mr. and Mrs. Kienle.

Respectfully submitted,

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